STATE OF MICHIGAN

COURT OF APPEALS

ALLSTATE INDEMNITY COMPANY and ALLSTATE INSURANCE COMPANY,

Plaintiffs-Appellees,

v

STAN DUDA,

Defendant-Appellant,

and

SHAWN NIKOLAI,

Defendant-Appellee.

UNPUBLISHED
December 19, 2006

No. 271196
St. Clair Circuit Court
LC No. 05-002424-CK

Before: Murphy, P.J., and Smolenski and Kelly, JJ.

PER CURIAM.

Defendant Stan Duda (hereafter defendant) appeals as of right an order holding that plaintiffs have no duty to defend or indemnify him in the underlying suit brought against him by Shawn Nikolai. The underlying suit is predicated on an allegation that defendant sexually assaulted Nikolai while she was asleep. We affirm. This case is being decided without oral argument under MCR 7.214(E).

Defendant argues that the trial court erred in granting summary disposition for plaintiffs because, viewing the disputed facts in a light most favorable to him, a question of fact exists as to whether the alleged harm to Nikolai caused by his intentional or criminal acts was intended or should reasonably have been expected. Particularly, defendant argues that from his perspective, he believed his sexual contact with Nikolai was consensual and had no reason to believe his intentional act of engaging in sexual activity with Nikolai would result in harm to her.

The trial court granted summary disposition to plaintiffs under MCR 2.116(C)(10). We review a grant of summary disposition under that subrule de novo. *Greene v A P Products, Ltd*, 475 Mich 502, 507; 717 NW2d 855 (2006). In doing so, we consider the documentary evidence submitted by the parties in the light most favorable to the party opposing the motion. *Id.*

If no theories of recovery asserted against an insured fall within the coverage of the insurance policy, an insurer does not have a duty to defend the insured in the matter. *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 480-481; 642 NW2d 406 (2002). The claims in Nikolai's underlying complaint are predicated on her allegation that, while she was asleep, defendant entered the room and sexually penetrated her.

We find it unnecessary to determine whether an "occurrence" or an "accident" was involved in this case because the criminal-acts exclusion clearly entitled plaintiffs to summary disposition. Nikolai's complaint was predicated on an intentional sexual assault. First, engaging in either sexual penetration or sexual contact with a person who is "physically helpless" is defined as constituting at minimum, respectively, criminal sexual conduct in the third degree or fourth degree (CSC III or IV), MCL 750.520d(1)(c) and MCL 750.520e(1)(c). The definition of "physically helpless" includes a person being asleep. MCL 750.520a(k). Thus, engaging in sexual penetration or sexual contact with a sleeping person is plainly a crime. The relevant policy exclusion bars coverage for any bodily injury that may reasonably be expected to result from criminal acts of an insured. Obviously, a sexual assault would reasonably be expected to result in severe physical and mental harm, so the policy exclusion bars coverage for the claims alleged against defendant.

Defendant's guilty plea to CSC IV in connection with the underlying conduct supports a conclusion that plaintiffs have no obligation to defend or indemnify him in this case. In *Frankenmuth Mut Ins Co v Masters*, 460 Mich 105, 107 & n 1; 595 NW2d 832 (1999), also a declaratory judgment action, our Supreme Court treated the criminal convictions of the insureds for arson as conclusive of them having intentionally set a fire despite their denials. Thus, defendant's conviction of CSC IV requires it to be considered as conclusively established for purposes of this case that he sexually assaulted Nikolai. Because such a sexual assault is a criminal act from which bodily injury would reasonably be expected, plaintiffs have no obligation to provide coverage under the policies at issue.

We also note that defendant's attempt to analogize this case to the case considered in *Allstate Ins Co v McCarn*, 466 Mich 277; 645 NW2d 20 (2002) (*McCarn I*), and *Allstate Ins Co v McCarn (After Remand)*, 471 Mich 283; 683 NW2d 656 (2004) (*McCarn II*),[1] is simply misplaced. That insurance coverage dispute involved one boy pulling the trigger of a gun he believed to be unloaded while aiming it at another boy's face; the gun fired resulting in the other boy's death. *McCarn I, supra* at 279. The *McCarn I* Court only dealt with the issue of whether an "occurrence" or "accident" took place under the policy, and it did not reach the issue of whether an intentional or criminal-acts exclusion applied. *Id.* *McCarn II* addressed the intentional or criminal-acts exclusion, and while a majority of Justices agreed that an intentional or criminal act occurred, there was no majority opinion with respect to what constituted an objective analysis on the issue of whether the injury could reasonably be expected from the intentional or criminal act. Here, we conclude as a matter of law that, under the policies and the

[1] *McCarn II* involved the same case before our Supreme Court in *McCarn I*.

facts, bodily injury would reasonably be expected to result from the intentional sexual assault for which defendant pled guilty.

Affirmed.

/s/ William B. Murphy
/s/ Michael R. Smolenski
/s/ Kirsten Frank Kelly